



November 24, 2025

Via Electronic Filing

Hon. Henry James Joseph, ALJ
Hon. Dawn MacKillop-Soller, ALJ
New York State Office of Renewable Energy Siting and Electric Transmission
Harriman Campus, Building 9
4th Floor
1220 Washington Avenue
Albany, NY 12226

RE: ORES DMM Matter No. 23-03023 – ORES RESPONSE TO AMERICAN LAND RESCUE FUND, INC.’S LATE FILED PETITION
Application of Fort Edward Solar LLC for a Major Renewable Energy Facility Siting Permit Pursuant to Article VIII of the New York State Public Service Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 100-Megawatt (MW) Solar Energy Facility Located in the Town of Fort Edward, Washington County.

Dear Judge Joseph and Judge MacKillop-Soller:

Pursuant to Administrative Law Judge (ALJ) Joseph’s November 7, 2025, email to the party list in the above-captioned matter, staff (Staff) of the Office of Renewable Energy Siting and Electric Transmission (ORES or the Office) respectfully submits this letter brief in response to the late filed petition submitted by the American Land Rescue Fund, Inc. (ALRF) on November 7, 2025.¹

I. PROCEDURAL BACKGROUND

For a complete recitation of the procedural background of this proceeding, including pre-application procedures, Staff review of the Application, issuance of the Draft Permit and Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues Determination Procedure (Combined Notice), the public hearing and comment period, and submission of the Applicant’s statement of issues and the petition for party status by Grassland Bird Trust,

¹ Pursuant to Judge Joseph’s November 7, 2025 Email, the Office deems ALRF’s November 7, 2025 Motion to Accept Late Filing as part of ALRF’s November 7, 2025 Petition itself, and not a separate motion.

Inc. (GBT), please see Staff's Response to Petition for Party Status and Statement of Issues by the Applicant (Staff's Responsive Brief) filed on October 27, 2025.²

In addition, Staff notes that all required public notices of events and documents during the filing and review of the Application have occurred:

- On May 2, 2024, the Applicant filed a 60-day Notice of Intent to File an Application (NOI) with the Office, which notice was published on its website and in accordance with the requirements of ORES regulations, including in local newspapers;³
- On July 16, 2024, the Applicant filed a 3-day NOI, which was also published on its website and in accordance with ORES regulations, including in local newspapers;⁴
- Application materials were initially filed with the Office on July 19, 2024, and the Application was fully filed on August 22, 2024. All original and supplemental Application materials, as redacted pursuant to New York Public Officers Law Article 6 (Freedom of Information Law or FOIL) § 87, have been available to the public on the Office's website since filing;⁵
- On August 20, 2024, the Chief ALJ issued a Ruling Adopting Protective Order, setting forth the process by which participants and their legal counsel, State agency and municipality parties, and participant consultants may gain access to protected information after executing an acknowledgment of the Protective Order which prohibits unauthorized release of protected information, as well as the process for challenging an assertion of protected information and obtaining a ruling by the ALJs;⁶
- On August 26, 2024, the assigned ALJs issued a Notice of Application Filing and Availability of Local Agency Account Funding which was posted with the Application materials on the Office's website;⁷ and
- On July 28, 2025, after the Application was determined to be complete, the Office issued a Draft Permit which was accompanied by the Combined Notice

² Record 90, Response to Petition for Party Status and Statement of Issues by the Applicant ("Staff's Responsive Brief) at 2-7.

³ Record 7, 60-Day NOI; Record 10, Affidavits and Proofs of Service.

⁴ Record 12, 3-Day NOI; Record 12, Letter Filing 3-Day NOI.

⁵ See ORES DMM Matter No. 23-03023, available at:

<https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=85407&MNO=23-03023>. After the transfer of the Office from the Department of State to the Department of Public Service, the ORES website hosting all permit application materials was migrated to the DPS website and its Document and Matter Management (DMM) system in February, 2025.

⁶ Record 38, Fort Edward Solar Ruling and Protective Order.

⁷ Record 42, Notice of Application Filing and Availability of Local Agency Account Funding.

which established October 6, 2025, as the deadline for submission of all petitions for party status, municipal Statements of Compliance with Local Laws and Regulations, and the Applicant’s Statement of Issues.⁸ The Applicant was directed to publish and serve the Combined Notice pursuant to ORES regulations, which it did.⁹ The Combined Notice provides the information necessary to find all documents related to the Application and the proceeding – including the Ruling Adopting Protective Order – on the Office’s website.¹⁰

II. ALRF’S LATE FILED PETITION

On November 7, 2025, over one month after the October 6, 2025, deadline for submission of petitions, ALRF filed a Motion to Accept Late Filing (Motion), Petition for Party Status (Petition) (together, the Late Filed Petition), and related documents.¹¹ ALRF requests its late filing be accepted, claiming that it was “blocked access to the administrative record” and thus penalized “for not filing sooner,” that “no prejudice results from including ALRF’s legitimate and necessary issues,” that its Petition “identifies multiple adjudicable issues,” that “[e]ndangered species impacts automatically qualify as significant issues requiring adjudication,” and that “public interest in the stewardship of this unique ecological landscape demands full participation and adjudication of ALRF’s issues.”¹²

ALRF seeks full party status and raises three issues for adjudication: (1) whether there was “procedurally unlawful concealment” of information regarding threatened and endangered (T & E) species and habitat to prevent required findings under PSL §§ 136 and 138 and in violation of due process; (2) whether “take” of occupied habitat adjacent to the Washington County Grasslands Wildlife Management Area (WMA) and in “associated conservation designations must be fully avoided,” and (3) whether the Draft Permit’s reliance on “generic USCs and post-hoc planning” can “satisfy the statutory requirement

⁸ Record 81, Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues Determination Procedure (Combined Notice).

⁹ See Record 81, Notice to Applicant; Record 89, Affidavits and Proofs of Service.

¹⁰ See Record 81, Combined Notice.

¹¹ Record 94, ALRF Motion to Accept Late Filing (Motion), Petition for Party Status (Petition)(together, the Late Filed Petition), Declaration of Alexandra Fasulo, Exhibit Index, Certificate of Service, and Cover Letter. The Office notes that it appears that ALRF did not email its November 7, 2025, submission to the assigned ALJs, as required by the Combined Notice. See Record 81, Combined Notice at 3 (“At the same time petitions and briefs are E-Filed on DMM, a copy of all papers must be emailed to the ALJ at the email address above.”)

¹² See Record 94, Motion. The Motion does not have page numbers, so citations herein are to the PDF page.

to ensure a net conservation benefit for T&E species in this setting.”¹³ In the alternative, ALRF seeks amicus status.¹⁴

III. ALRF’S LATE REQUEST FOR FULL PARTY STATUS SHOULD BE DENIED

ALRF’s Late Filed Petition fails to satisfy the required elements of 16 NYCRR § 1100-8.4(e) and should not be granted. Late filed petitions for party status are granted only in limited circumstances where, in addition to the required contents of a petition for party status, there is:

- i. A demonstration that there is good cause for the late filing;
- ii. A demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and
- iii. A demonstration that participation will materially assist in the determination of adjudicable issues raised in the proceeding.¹⁵

A. ALRF fails to demonstrate good cause for filing late

ALRF has failed to demonstrate good cause for the late filing of its petition. ALRF alleges delay resulting from “procedural irregularities and concealment of critical environmental information that made timely, informed participation impossible.”¹⁶ ALRF further contends that the fact that it had only redacted documents and was not granted access to ORES offices upon visiting, establishes good cause for acceptance of its late filed petition.¹⁷ ALRF claims it “only discovered the extent of concealment” of alleged relevant redactions on November 4-5 when it reviewed the hard copy publicly available files in Fort Edward.¹⁸

That ALRF became aware of the proceeding so late in the issues determination process does not, without more, demonstrate good cause for late filing of the petition. The ORES application process provides robust and repeated public notice well before the adjudicatory process. No less than 60 days prior to filing an application, applicants are required to publish a notice of intent to file an application and hold at least one meeting

¹³ Record 94, Petition at 4.

¹⁴ Record 94, Petition at 3.

¹⁵ 16 NYCRR § 1100-8.4(e).

¹⁶ Record 94, Motion at 1.

¹⁷ Record 94, Motion at 1-2.

¹⁸ Record 94. Motion at 2.

with community members who may be adversely impacted by the facility.¹⁹ Further, no less than three days prior to application filing, the Applicant must file a notice of application filing with ORES, in newspapers in each municipality in which the proposed facility is to be located, in the newspaper of largest circulation in the county(ies) in which the proposed facility is to be located and, if any are available, in a free newspaper publication that services the area in which the proposed facility is to be located, in addition to providing written notice to all persons residing within one (1) mile of the proposed solar facility.²⁰

As set forth above, the Applicant published the 60-Day NOI in May 2024.²¹ The Applicant filed the 3-Day NOI with ORES on July 19, 2024.²² ALRF could have reviewed Application documents any time after the Application was fully filed in August, 2024. However, ALRF did not attempt to obtain documents until November 2025, eighteen months after the first public notice of the Application filing, and well after the Combined Notice was issued on July 28, 2025.²³

ALRF asserts it should not be penalized for not filing sooner when it experienced “block[ed] access to the administrative record.”²⁴ ALRF blames its inability to file in a timely manner on redactions regarding T&E species in the Application materials on the ORES website and in paper copies in Fort Edward.²⁵ It claims that when representatives traveled to ORES Offices, they were not provided access to Staff or records.²⁶ It neglects to include that representatives showed up at the Offices late in the day without an appointment, and the appropriate individual to receive the request had already left for the day.

ALRF also attaches to its Petition partial copies of agency responses acknowledging receipt of FOIL requests to the New York State Department of Environmental Conservation (NYSDEC) and New York State Department of Public Service (NYSDPS) on November 4 and 5, 2025, respectively, requesting unredacted versions of the Application materials, which it claims “prevent[ed] the required public review.”²⁷

¹⁹ 16 NYCRR §§ 1100-1.3(b), (d).

²⁰ 16 NYCRR §§ 1100-1.6(c)(1)-(3).

²¹ Record 10, Letter Filing Affidavits of Proof of Service and Publication of 60-day Notice.

²² Record 12, 3-Day Notice of Intent to File an Application.

²³ Record 94, Motion at 2. ALRF President Alexandra Fasulo spoke at the public comment hearing held on September 30, 2025, which was held before the petition filing deadline of October 6, 2025. See Record 83, Public Hearing Transcript at 42-45.

²⁴ Record 94, Motion at 2.

²⁵ Record 94, Motion at 1-2.

²⁶ Record 94, Motion at 1-2.

²⁷ Record 94, Petition Exhibits B, C.

ALRF misunderstands the treatment of confidential information under FOIL. Agencies may not disclose information protected under FOIL simply because the individual seeking that information visits the ORES offices in person or makes a request for unredacted records. While FOIL does require agency records to be made available for public inspection, it exempts from disclosure certain types of records to protect confidential information.²⁸ Relevant here is FOIL's exception for records specifically exempt from disclosure by state or federal statute.²⁹ The New York Environmental Conservation Law (ECL) § 3-0301(2)(r) protects from disclosure "rare, threatened, and endangered species locational information."³⁰

Pursuant to 16 NYCRR § 1100-1.4(a)(5), the Applicant must identify information they request the Office not disclose and the reasons why the information should be excepted from disclosure.³¹ The Applicant provided a non-disclosure memorandum in accordance with 16 NYCRR § 1100-1.4(a)(5) explaining the information which it asserts should be protected from disclosure under FOIL. Members of the public are not entitled to such information without following proper procedures to ensure sensitive information remains secure. Thus, while ALRF should have made an appointment to review records held at ORES's offices, it still would not have been granted access to confidential information. ORES's and other agencies' adherence to FOIL's exception for records specifically exempt from disclosure by state or federal statute does not amount to "procedural irregularities and concealment of critical environmental information."

Finally, had ALRF initiated its review of the Application earlier, it could have followed the proper procedures to obtain unredacted copies of T &E species information. In the Ruling Adopting Protective Order dated August 20, 2024, the Chief ALJ provided a Protective Order for protected information in the Application.³² The Protective Order explains that its purpose is to "facilitate the Participants' involvement in and the expeditious conduct of this proceeding by making Protected Information available to the parties promptly, without adversely affecting any Participant's legitimate interests in either maintaining or challenging the confidentiality of the Protected Information."³³ The Protective Order also explains the process for obtaining information subject to the Protective Order.³⁴ The Order includes three attachments, each associated with signing

²⁸ N.Y. Pub. Off. Law § 87.

²⁹ N.Y. Pub. Off. Law § 87.

³⁰ N.Y. Env't Conserv. Law § 3-0301(2)(r).

³¹ 16 NYCRR § 1100-1.4(a)(5).

³² Record 38, Fort Edward Solar Ruling and Protective Order.

³³ Record 38, Fort Edward Solar Ruling and Protective Order at 1.

³⁴ Record 38, Fort Edward Solar Ruling and Protective Order at 5-8.

the protective order. Members of the public have the option to sign the Protective Order by signing as a “Participant” under Attachment A.³⁵ ALRF could have executed the Protective Order as a Participant at any time after the Order was made available in August, 2024 and gained access to the confidential information it claims it needed to conduct its review of the Application and prepare a petition prior to the submission deadline of October 6, 2025.

ALRF’s late interest in the proceeding and failure to follow proper procedure is not good cause to grant its late filed petition.

B. ALRF fails to demonstrate that its participation will not significantly delay the proceeding or unreasonably prejudice the other parties

ALRF must also demonstrate that its participation will not significantly delay the proceeding or unreasonably prejudice the other parties. ALRF alleges that because the “proceeding is ongoing, and no party has relied upon ALRF’s absence,” acceptance of its petition will not prejudice any party.³⁶ However, acceptance of ALRF’s late filed petition will indeed significantly delay the proceeding and therefore prejudice the other parties who submitted petitions and issues statements in a timely matter. ALRF filed its petition on November 7, 2025, 32 days after the October 6, 2025, deadline. The ALJs are required to issue a ruling within 30 days of Staff’s October 27, 2025, response.³⁷ Acceptance of ALRF’s petition will likely delay the ALJ ruling.

New York State enacted the Climate Leadership and Community Protection Act (CLCPA) to reduce harmful emissions and combat climate change. The CLCPA, among other things, requires that a minimum of 70% of statewide electric generation be produced by renewable energy systems by 2030, and that by the year 2040 the statewide electrical demand system will generate zero emissions.³⁸ To help achieve these targets, Article VIII establishes a process for timely permitting whereby ORES must make a final decision on a major renewable energy facility siting permit within one year from the date the application was deemed complete. To achieve this, 16 NYCRR Part 1100 provides time

³⁵ Record 38, Fort Edward Solar Ruling and Protective Order at pdf pg 17-18 (Attachment A) (See also page 2, Participant is defined in the Order as “a party to the proceeding or, prior to a ruling on party status, any potential party appearing on the party list for the proceeding that may seek party status.”).

³⁶ Record 94, Motion at 2.

³⁷ 16 NYCRR § 1100-8.3(b)(5).

³⁸ CLCPA, Chapter 106 of the Laws of 2019, Section 1, subd. 12(d) and Section 4, creating a new section 66-p of the Public Service Law at § 66-p(2).

limits on the various stages of application review, issuance of completeness determinations, and draft permits.³⁹ Further, the Office undertakes a focused adjudicatory process with established deadlines where evidentiary hearings are limited to issues raised by potential parties that are demonstrated to be “substantive and significant” through a sufficient offer of proof.⁴⁰ To grant the petition filed over a month late would undermine the timeliness of this process.

In addition, the construction of the Facility involves the coordination of many different entities - contractors, financiers, consultants, etc. - such that an unreasonable delay could impose unnecessary costs and challenges. It would be unjust to the other parties to accept ALRF’s late filed petition without a sufficient showing of good cause for the late filing when other potential parties submitted petitions on time.⁴¹

C. ALRF fails to demonstrate that its participation will materially assist in the determination of adjudicable issues raised in the proceeding

For a late filed petition to be granted, the petitioner must also demonstrate that its participation will materially assist in the determination of adjudicable issues raised in the proceeding. While ALRF states that “Acceptance will ensure: a more complete and accurate record; consideration of statutory endangered species protections; [and] transparent compliance with PSL § 138(1)(c),” it does not elaborate as to how this is the case.⁴² As demonstrated below, ALRF fails to meet its burden to demonstrate substantive and significant issues through a sufficient offer of proof and therefore fails to raise any adjudicable issues. Moreover, GBT already raised similar issues regarding the Facility’s impact on threatened and endangered bird species in its petition timely filed on October 6, 2025.⁴³ Because these issues have already been raised by another party and ALRF fails to demonstrate through a “sufficient offer of proof specifying the witness(es), the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to each issue identified” how it could materially assist in the determination of such issues, its request for permission to file the late petition should be denied.⁴⁴

³⁹ PSL § 142(6); see also 16 NYCRR Subpart 1100-4.

⁴⁰ 16 NYCRR Subpart 1100-4.

⁴¹ See Record 84, Grassland Bird Trust, Inc. Petition for Full Party Status and Statement of Issues for Adjudication (GBT Petition).

⁴² Record 94, Motion at 2.

⁴³ See Record 84, GBT Petition.

⁴⁴ See 16 NYCRR § 1100-8.4(c)(2)(ii).

Regarding its claim of “unlawful concealment” of protected information, as discussed herein, the issue has no merit and does not raise a substantive and significant issue. It is therefore not necessary to grant ALRF’s late filed petition to adjudicate that issue. ALRF fails to demonstrate that granting its late filed petition will materially assist in the determination of adjudicable issues raised in the proceeding.

For all of the foregoing reasons, ALRF’s request for permission to file a late petition should be denied.

IV. ALRF’s PETITION FAILS TO RAISE ANY ADJUDICABLE ISSUES

In addition to its failure to meet the standard for filing a late petition over a month after the publicly noticed deadline, ALRF’s petition should be denied because it fails to demonstrate any substantive and significant issues. Please refer to Staff’s Responsive Brief for a full discussion of the standard of review for substantive and significant issues.⁴⁵

As set forth above, ALRF proposes three issues for adjudication and requests that the siting permit be denied “because ORES cannot lawfully make the findings required by PSL § 138(1)(c) on the present record.”⁴⁶ In the alternative, it requests rescission of the Draft Permit and a “restart” of the Application review process with:

- “Unredacted disclosure of species, occupied habitat, and survey methods/locations to the maximum extent permissible by law;
- A transparent, adjudicable record capable of supporting (or disproving) the statutory findings; and
- A meaningful opportunity for cross-examination and site-specific conditions—if, and only if, the Applicant can demonstrate full avoidance of occupied habitat (otherwise, denial remains required).”⁴⁷

ALRF’s requests should be denied. As demonstrated below, unredacted (confidential) versions of all Application materials were provided to the Office upon which Staff made its recommendations in the Draft Permit. Further, any member of the public who signs up for the Document and Matter Management (DMM) System party list and signs the Protective Order and agrees to keep such information confidential may have access to it. “Full avoidance of occupied habitat” is not required by Article VIII or its implementing regulations. Rather, as set forth in Staff’s Responsive Brief submitted in response to GBT’s Petition for Party Status, the record supports Staff’s recommendation

⁴⁵ Record 90, Staff’s Responsive Brief at 17-20.

⁴⁶ Record X, ALRF Petition for Party Status at 5.

⁴⁷ Record 94, ALRF Petition at 5.

that the Facility will achieve a net conservation benefit for listed T & E species impacted by the Facility.⁴⁸ The issues determination process, which has already begun upon notice to the public, provides meaningful opportunity for potential parties to raise issues for adjudication and, if identified by the ALJs, for an evidentiary hearing on such issues.

A. ALRF Fails to Provide Sufficient Offers of Proof

For a potential party to participate in an adjudicatory hearing, it must file a petition in writing that, among other things, contains an offer of proof specifying the witness(es), the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to each issue identified.⁴⁹ ALRF appends 11 exhibits to its Petition as its “offers of proof” for the three issues for adjudication it raises in its Petition:⁵⁰

- Exhibit A: Redacted excerpts of Exhibit 12 (NYS T&E Species) provided to the public on ORES website;
- Exhibit B: FOIL Request (DEC/Region 5) seeking unredacted species/occupied habitat records, filed November 4, 2025;
- Exhibit C: FOIL Request (PSC/Records Access) seeking unredacted wildlife studies and surveys, filed November 5, 2025;
- Exhibit D: Photograph: “RESTRICTED AREA — ENDANGERED SPECIES CRITICAL AREA” DEC signage at/near facility area;
- Exhibit E: Photograph: Washington County Grasslands WMA signage and surrounding habitat;
- Exhibit F: Photograph: “For Public Use” application binder with fully blacked pages;
- Exhibit G: Photograph: On-site public review materials (USB/binder) showing pervasive redactions;
- Exhibit H: Photograph/Screen: ALRF on premises attempting to review records;
- Exhibit I: Photograph: DEC welcome signage noting the purpose of the WMA;
- Exhibit J: Photograph: Audubon Important Bird Area signage at Washington County Grasslands WMA; and
- Exhibit K: Photograph: Sensitive Habitat signage at Washington County Grasslands WMA.⁵¹

⁴⁸ Record 90, Staff’s responsive brief at 21-36.

⁴⁹ 16 NYCRR § 1100-8.4(c)(2)(ii). Please see Staff’s Responsive Brief for a full discussion of petitioner’s burden of proof and obligation to provide a sufficient offer of proof. Record 90, Staff’s Responsive Brief at 20-21.

⁵⁰ Record 94, ALRF Petition at 6-17.

⁵¹ Record 94, ALRF Petition at 6-17.

ALRF's exhibits fall well short of the standard for a sufficient offer of proof. They fail to specify (1) the witness who would present the evidence and (2) the grounds upon which the assertion is made with respect to each issued identified. The burden is on ALRF to make a credible showing to support its allegations based on specifically identified witnesses along with the factual foundation for those claims. A credible showing can be made by including with a petition for party status an exhibit or attachment with pre-filed testimony or an affidavit of an expert witness, as well as a description of each witness's credentials. The "offers of proof" made by ALRF consisting of screen shots and photographs with brief titles or labels of what is depicted do not meet this standard.

The regulations at 16 NYCRR Part 1100 make clear that ALRF carries the burden of persuasion at this stage of the proceeding through a sufficient offer of proof.⁵² ALRF has clearly failed to meet its burden. Thus, none of the issues in ALRF's Petition rise to the level of a substantive and significant issue for adjudication. Rather, its Petition amounts to a list of general criticisms and expressions of concern.

Although ALRF fails to meet the minimum requirements for full party status and each of its proposed issues for adjudication should be rejected on this basis alone, each of these issues is further discussed below.

B. Threatened or Endangered Species Information was Lawfully Redacted, available to ORES at the outset, and available to the public pursuant to the August 2024 Protective Order

ALRF claims that "[p]rocedurally unlawful concealment of species/occupied habitat defeats PSL §§ 136 & 138 findings and due process" and that this issue is adjudicable because "[a] reasonable person would require further inquiry where agency conclusions depend on data the public is not permitted to see; without disclosure, ORES cannot lawfully certify avoidance/minimization/mitigation or net conservation benefit."⁵³ Based on these statements – as well as others in its November 7, 2025 filing - ALRF appears to be advancing two arguments: (1) ORES itself cannot determine that the Applicant satisfies the applicable statutes and regulations if certain information is confidential, and (2) if certain information is confidential, the public cannot fully participate in Article VIII proceedings.⁵⁴

⁵² See 16 NYCRR § 1100-8.3(c)(4).

⁵³ Record 94, ALRF Petition at 4.

⁵⁴ See, e.g. Record 94, ALRF Petition at 3 ("ORES must identify site-specific adverse impacts not addressed by USCs and craft site-specific permit terms to avoid/minimize/mitigate and must achieve a net conservation benefit for T&E species. Without public disclosure of species/occupied habitat, these findings cannot be

As to ALRF's first argument, ORES Staff has complete access to all of the Application materials (public and confidential) and has a complete record on which to make the determinations that form the basis of the recommendations contained in the Draft Permit.⁵⁵ When an applicant initially files with ORES (via DPS's DMM System), it provides a redacted public version of a document and simultaneously files an unredacted confidential version of that document that is not publicly posted to DMM. ORES Staff has immediate, automatic access to this confidential information, as outlined in the Protective Order:

Staff of the Office of Renewable Energy Siting and Electric Transmission (Office staff) is subject to and is familiar with the provisions of Public Officers Law § 74, which provides for disciplinary action, fine, or prosecution for the disclosure of confidential information. Office staff is not required to execute the Acknowledgement in this Protective Order to have access to Protected Information but is otherwise bound by the terms of this Protective Order.⁵⁶

Thus, public access to the confidential information has no bearing on ORES's ability to make the required determinations and recommendations reflected in the Draft Permit.

As to ALRF's second argument regarding the T & E species information that has been treated as confidential since the outset of this proceeding, this approach is not simply a policy choice by ORES. Environmental Conservation Law § 3-0301(2)(r) protects "rare, threatened, and endangered species locational information" from disclosure. Here, the Applicant kept such T & E species information confidential on the grounds that it falls under ECL § 3-0301(2)(r). On July 22, 2024, the Applicant provided a non-disclosure memorandum explaining the information which it asserted was "Information Related to

made"); ("The public cannot test agency conclusions or propose informed conditions"); ("Public participation obstructed: FOIL acknowledgments (Exhibits B, C) show ALRF actively sought unredacted records; the agency has withheld them, frustrating the statutory scheme and due process"). Elsewhere in its Petition, ALRF appears to advance yet a third argument: that the Application documents have been over-redacted [see Record 94, ALRF Petition at 3 ("FOIL (Public Officers Law §§ 84–90): mandates access to records; any redactions must be narrowly tailored with cited exemptions. Wholesale concealment of species/occupied habitat blocks due process.")]. The August 20, 2024, Protective Order includes an explanation of the process by which a Participant may object to the designation of particular documents or other materials as Protected Information (Record 38, Fort Edward Ruling Adopting Protective Order at 11-13). Therefore, ALRF's claim is more properly brought before the ALJs in a separate proceeding and is not a substantive and significant issue subject to the Issues Determination Procedure.

⁵⁵ See Record 81, Combined Notice at 1-2 ("On issuing the draft permit conditions, ORES staff takes the position that the proposed facility, together with the uniform and site-specific standards and conditions contained in the draft permit, would comply with applicable laws and regulations.)

⁵⁶ Record 38, Protective Order at 5-6.

Endangered, Threatened or Protected Species” which is protected from public disclosure under FOIL § 87(2)(a) and ECL § 3-0301(2)(r).⁵⁷

ALRF characterizes its efforts to access the confidential information as being “obstructed” by ORES. As described above, this information is protected from public disclosure under FOIL § 87(2)(a) and ECL § 3-0301(2)(r), and there was no obstruction. Rather, there is a procedure in place to gain access to confidential information in an Article VIII proceeding, which ALRF did not follow. Instead, based on ALRF’s Exhibit B, it appears to have submitted a FOIL request for confidential information to the wrong agency: NYSDEC and not ORES. ALRF’s Exhibit C, which appears to reflect a FOIL Request to NYSDPS, is not the process for obtaining confidential information as outlined in the Protective Order.

By contrast, GBT – a group composed of members of the public with similar concerns about the potential impacts of the proposed Facility on T & E species as ALRF – not only followed the correct process to obtain confidential information but also did so well before the deadline for submitting a petition for party status in this proceeding. Its legal representative filed an executed copy of Attachment A of the Protective Order on August 21, 2024, and its consultant filed an executed copy of Attachment C on May 2, 2025, both well before the public comment hearing (held on September 30, 2025), the deadline for submission of written public comments (October 3, 2025), and the deadline for submission of petitions for party status (October 6, 2025).⁵⁸

Members of the public have the option to sign the Protective Order by signing as a “Participant” under Attachment A. As illustrated by GBT’s actions, members of the public not only in theory but also in practice could and did request and acquire access to confidential information pertaining to threatened or endangered species in this proceeding. Thus, ALRF fails to demonstrate any “unlawful concealment” of such information, much less any violation of due process in the treatment of confidential information.

With respect to ALRF’s proposed offers of proof regarding this issue – photos of (1) the redacted application materials and (2) ALRF’s FOIL Requests – none allege facts that are either contrary to what is in the application materials or draft siting permit, demonstrate an omission in the application or draft siting permit, or show that defective information was used in the application or draft siting permit.⁵⁹ Thus, in addition to not constituting sufficient offers of proof in and of themselves (e.g., no witness or qualified

⁵⁷ Record 25, Applicant’s Non-Disclosure Memorandum at 4.

⁵⁸ Record 36, GBT, Attachment A of Fort Edward Ruling Adopting Protective Order; Record 76, Avian Consulting Fort Edward Solar Protective Order Signed.

⁵⁹ See Record 94, ALRF Petition, Exhibits A, B, C, F, G, H.

expert is identified), the substance that they purport to stand for does not satisfy the relevant legal standard.

In light of the above, ALRF has not raised a substantive and significant issue regarding the availability of confidential T & E species information.

C. Article VIII permits the take of listed T&E species so long as uniform and site-specific permit conditions achieve a net conservation benefit to such impacted species under PSL § 138(1)(c)

ALRF claims it raises an adjudicable issue over the take of occupied habitat by the Facility because, it asserts, “[w]here occupied habitat is implicated, no generic ratio can restore ecological function on-site; avoidance is the only lawful pathway,” and “[d]enial is therefore the only remedy consistent with PSL § 138(1)(c).”⁶⁰ As an “offer of proof” on this issue, ALRF attaches photographs of signage at the Washington County Grassland Wildlife Management Area (WMA) purportedly taken on October 14, 2025, which it claims is “corroborating presence of listed species.”⁶¹ ALRF also claims as an “offer of proof” that the “facility footprint and array placement would surround/about WMA grasslands and convert open-grass habitat to industrial infrastructure, causing displacement, barrier effects, and collision risk inconsistent with net conservation benefit.”⁶²

ALRF misstates the law. PSL § 138(1)(c) does not require complete avoidance. It specifically permits impacts - or “take” - of species and provides in such event that “ORES shall require that the application of uniform conditions and site-specific conditions shall achieve a net conservation benefit to any impacted endangered and threatened species.”

As described in Staff’s Responsive Brief, the Draft Permit imposes both Uniform Standard Conditions (USCs) and a Site Specific Condition (SSC) that will achieve a net conservation benefit for the impacted grassland bird T&E species:

To avoid and minimize impacts to affected T&E species and achieve a net conservation benefit for adversely affected T & E grassland bird species, the Draft Permit mandates compliance with the USCs for the construction and operation of the Facility as part of the NCBP and either payment of the required mitigation fee or permittee-implemented grassland bird conservation. In addition, the Draft Permit imposes a site-specific condition requiring submission of a final NCBP to the Office for review and approval

⁶⁰ Record 94, ALRF Petition at 4.

⁶¹ Record 94, ALRF Petition at 4, 2.

⁶² Record 94, ALRF Petition at 4, Exhibits D, E.

as a mandatory pre-construction compliance filing, consistent with 16 NYCRR § 1100-10.2.⁶³

To the extent that ALRF attempts to raise an adjudicable issue over the sufficiency of the required mitigation ratios for permittee-implemented conservation as set forth in ORES regulations, this issue is similar to the issue already raised by GBT over whether the uniform standard condition in the Draft Permit setting a default mitigation ratio of less than 1:1 will achieve a net conservation benefit.⁶⁴ As set forth in Staff's Responsive Brief in response to this issue, such a "claim regarding the sufficiency of the mitigation ratios as established by the Office regulations, adopted through the state's rulemaking process, is not a matter for adjudication in this proceeding."⁶⁵ As a "broad critique of the regulation itself, this issue is also outside the scope of this Facility-specific issues determination procedure."⁶⁶ Further, ALRF makes no offer of proof to demonstrate why the regulatory mitigation ratios cannot "restore ecological function on-site" as it claims. As set forth in Staff's Responsive Brief, nothing related to the facts of this specific Application undermines the applicability of the prescribed mitigation ratios.⁶⁷

Regarding its assertion that the placement of the Facility will cause "displacement, barrier effects, and collision risk," ALRF does not provide any expert report or other information to support this claim, nor does it specify any witness who would present such evidence.

ALRF fails to raise an adjudicable issue over whether the take of listed T&E species must be fully avoided or the regulatory mitigation ratios are sufficient, much less shown that the permit must be denied.

D. The statutory requirement to ensure a net conservation benefit for impacted T&E species is met

It is unclear what issue exactly ALRF raises for adjudication in its third "substantive and significant" issue: "The Draft Permit's reliance on generic USCs and post-hoc planning cannot satisfy the statutory requirement to ensure a net conservation benefit

⁶³ Record 90, Staff's Responsive Brief at 12, citing Record 80, Draft Permit at 18-20, 23, 37 ("Final Net Conservation Benefit Plan (NCBP) - Consistent with 16 NYCRR § 1100-10.2, the Permittee shall submit a final NCBP, developed in consultation with the Office and implemented prior to any disturbance of the identified occupied habitat of threatened or endangered species.")

⁶⁴ Record 84, Grassland Bird trust, Inc. Petition for Full Party Status and Statement of Issues for Adjudication (GBT Petitions) at 34.

⁶⁵ Record 90, Staff's Responsive Brief at 31.

⁶⁶ Record 90, Staff's Responsive Brief at 31.

⁶⁷ Record 90, Staff's Responsive Brief at 31-34.

for T&E species in this setting.”⁶⁸ However, the crux of its claim appears to be that a net conservation benefit cannot be achieved. ALRF again points to its photographs of signage in Exhibits D and E to its Petition as its offer of proof that “[t]he project lies within the core of New York’s premier grassland complex” and “the agency’s own public-facing materials ... confirm exceptional sensitivity.”⁶⁹ It then claims that “[w]ith species and habitat data concealed, there is no record competent to demonstrate that any site-specific mitigation could exceed losses,” and that this is issue is adjudicable because “[a]bsent a transparent, species-specific plan with publicly reviewable record support, the statutory “net conservation benefit” cannot be met.”⁷⁰

To the extent that ALRF is challenging the statutory and regulatory scheme under Article VIII, as discussed above, PSL § 138(1)(c) specifically provides that a net conservation benefit shall be achieved through USCs and SSCs. To the extent ALRF claims that the location of the Facility demonstrates “exceptional sensitivity,” again, it provides no expert report or other information, nor does it make any attempt to specify witnesses or the nature of the evidence the person expects to present. And again, as demonstrated in Staff’s Responsive Brief and reiterated above, the location of the Facility does not warrant any different mitigation ratios. Finally, to the extent it claims that redaction of protected information in Application materials somehow prevents achievement of a net conservation benefit, as discussed above, all necessary T & E information on which Staff based its recommendations was provided to the Office and upon acknowledgment of the Protective Order, members of the public could also obtain access.

As discussed in Staff’s Responsive Brief, all statutory and regulatory requirements regarding impacts to T & E species and achievement of a net conservation benefit have been met:

- the Applicant completed a wildlife site characterization report summarizing existing public information on bird, bat and other species within five miles of the Facility site;
- the Applicant consulted with the Office and NYSDEC regarding the surveys that would be required to assess potential significant adverse impacts to T & E species;
- Following completion of breeding bird surveys and winter raptor surveys and additional consultation with the Office and NYSDEC on final survey results, the Office issued a Determination of Occupied Habitat, Incidental Take and Net Conservation Benefit (Take Determination);

⁶⁸ Record 94, ALRF Petition at 4.

⁶⁹ Record 94, ALRF Petition at 4.

⁷⁰ Record 94, ALRF Petition at 4.

- After multiple revisions to the Facility layout to reduce impacts to T & E grassland bird occupied habitat, the Office issued a final revised Take Determination on March 20, 2025, which concludes that “the Applicant is required to develop and submit a Net Conservation Benefit Plan (NCBP) for the proposed Facility to minimize the significant adverse impact(s) to these habitats” pursuant to 16 NYCRR §§ 1100-2.13(d) and (f);
- A preliminary NCBP was provided with the Application that proposed establishment of a conservation easement on properties within and adjacent to the Facility Site or, in lieu of such land conservation, payment of a mitigation fee “commensurate with the actual acreage of occupied habitat taken” of 567.08 acres;” and
- the Draft Permit mandates compliance with the USCs for the construction and operation of the Facility as part of the NCBP and either payment of the required mitigation fee or permittee-implemented grassland bird conservation and imposes a site-specific condition requiring submission of a final NCBP to the Office for review and approval as a mandatory pre-construction compliance filing.⁷¹

Based on the foregoing, Staff recommended a finding that the Facility will achieve a net conservation benefit for effected T & E species as required by PSL § 138(1)(c). ALRF fails to make any offer of proof to demonstrate facts contrary to what is in the application materials or Draft Permit, an omission in the application or Draft Permit, or that defective information was used in the application or Draft Permit.’

ALRF fails to raise any adjudicable issues, and its request to file a late petition should be denied.

V. ALRF’S REQUEST FOR AMICUS STATUS SHOULD BE DENIED

ALRF appears to make a blanket request, as an alternative to full party status, for amicus status: “In the alternative, ALRF seeks amicus status.”⁷²

16 NYCRR § 1100-8.4(f)(2) lays out the applicable standard for granting amicus status, which includes a “finding that the petitioner has filed an acceptable petition pursuant to subdivisions (c)(1) and (3) of this section.” 16 NYCRR § 1100-8.4(c)(3), in turn, sets out two additional criteria for amicus requests. The first requirement is to “identify the nature of the legal or policy issue(s) to be briefed which meets the criteria of [16 NYCRR §]1100-8.3(c).”⁷³ 16 NYCRR § 1100-8.3(c) provides the “[s]tandards for adjudicable

⁷¹ Record 90, Staff’s Responsive Brief at 9-12 (citations omitted).

⁷² Record 94, ALRF Petition at 3.

⁷³ 16 NYCRR § 1100-8.4(c)(3)(i).

issues” (i.e., substantive and significant issues). Therefore, the “legal or policy issue” identified by an amicus party must meet the substantive and significant standard set forth in 16 NYCRR § 1100-8.3(c). The second requirement is to “provide a statement explaining why the proposed party is in a special position with respect to that issue.”⁷⁴

As demonstrated herein, ALRF has not raised any substantive and significant issues for adjudication. Thus, it fails to satisfy the first requirement of 16 NYCRR § 1100-8.4(c)(3) and should be denied amicus status on that basis alone. In addition, ALRF does not provide any statement explaining why it is in a special position with respect to the issues raised. This failure to satisfy the second requirement of 16 NYCRR § 1100-8.4(c)(3) is another basis to deny ALRF’s amicus request. Indeed, ALRF’s request for amicus status appears to seek a second bite at some level of party status, without even an attempt at meeting the regulatory requirements. This is not the purpose of amicus status.

As demonstrated above, ALRF also fails to show how it could materially assist in the determination of such issues. Based on the foregoing, its request for amicus status should be denied.

VI. CONCLUSION

For all of the foregoing reasons, ALRF's Late Filed Petition should be denied because it not only fails to meet the standard to allow filing of a late petition, but it also fails to demonstrate any substantive and significant issue for adjudication.

⁷⁴ 16 NYCRR § 1100-8.4(c)(3)(ii).